

The Virginia Freedom of Information Act (FOIA) For PEATC & Special Education Advisory Committees

Virginia Freedom of Information Advisory Council

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Introduction

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About the FOIA Council

§§ [30-178 through 30-181](#)

- State legislative branch advisory council
- Legislative forum for studies and recommendations to the General Assembly
- Answer questions from government, citizens, and media
- Publishes advisory opinions and educational materials
- Provides FOIA training presentations
- Not an investigative or enforcement agency

Purpose & Policy of FOIA

§ [2.2-3700](#)

- Ready access to public records
- Free entry to meetings of public bodies
- FOIA is to be liberally construed to promote awareness of governmental activities and operations
- Any exemption from public access to records or meetings shall be narrowly construed
- No record shall be withheld or meeting closed to the public unless specifically made exempt

Other Laws May Also Apply

- Other laws may also affect access to public records and meetings, but which laws apply will vary depending on the type of record, type of meeting, and type of elected official.
- Because the FOIA Council's statutory authority is limited to providing advice and guidance regarding FOIA, there will be times when you need to consult others for advice.

Public Records

Recognizing and responding to FOIA requests

§§ [2.2-3704](#) through [2.2-3706](#)

Introduction to Records & FOIA

- All public records are presumed open unless specifically exempt
- Definition of “public record” (§ [2.2-3701](#))
 - all writings and recordings that consist of letters, words or numbers, or their equivalent . . . however stored, and regardless of physical form or characteristics
 - prepared or owned by, or in the possession of a public body or its officers, employees or agents
 - in the transaction of public business.
 - Note: draft versions are public records

Debunking FOIA myths

- FOIA addresses access to public records (§ [2.2-3704](#))
- FOIA does not require you to answer questions, give interviews, or provide explanations
- Inspect or Copy
- Not free – public bodies may charge to produce public records
- FOIA exemptions generally do not prohibit release
- Informal vs. formal requests – no difference

Who has the right to make a request under Virginia FOIA?

- Citizens of the Commonwealth
- Representatives of newspapers & magazines with circulation in the Commonwealth
- Representatives of radio & television stations broadcasting in or into the Commonwealth

Requests from out-of-state

- Best practice is to respond to out-of-state requesters even if they do not have access rights under Virginia FOIA
 - Standardizes practices for internal consistency
 - Out-of-state requester can get a Virginia citizen to make the same request anyway
- Do not have to follow FOIA procedure strictly since out-of-state requesters cannot enforce Virginia FOIA

Requesting Public Records

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- How requests may be made:
 - Requester must identify records with reasonable specificity
 - Public body may require the requester's name & legal address
 - A request does not have to be in writing
 - A request does not have to say "FOIA"
 - The requester's purpose does not matter
- Requester has the choice to inspect or to receive copies

Responding to Records Requests

- Five working days to respond after request is received
 - The first day to respond is the day after the request is received
 - Weekends and legal holidays do not count as working days
- Failure to respond is deemed a denial of the request and a violation of FOIA
- Creation of new records not required
- Always allowed to make agreements with the requester on the production of records

Five Responses

- 1) Provide the requested records
- 2) Requested records are being entirely withheld
- 3) Requested records are being provided in part and withheld in part
- 4) Requested records could not be found or do not exist
- 5) Additional time needed to search for/produce records

Exemptions & Redaction

§ [2.2-3704.01](#)

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- Most FOIA exemptions are not prohibitions – exempt records may be withheld, but they may also be released in the discretion of the custodian
 - Only exempt portions of records may be withheld (redacted)
 - An entire record may be withheld only if the entire record is exempt

Charges for Records Requests

- May make reasonable charges not to exceed actual cost incurred in accessing, duplicating, supplying, or searching for requested records
 - Cannot charge more than the actual cost to the public body
 - Requester may request an estimate in advance
 - Public body may require an advance deposit if estimate is > \$200
 - If a bill goes unpaid 30 days or more, do not have to respond to new requests until the outstanding balance is paid

Exemptions of General Application

- Personnel records - § [2.2-3705.1](#) (1)
- Attorney-client privilege- § [2.2-3705.1](#) (2)
- Legal memoranda and other work product - § [2.2-3705.1](#) (3)
- Educational Records - § [2.2-3705.4](#)
- Various laws outside of FOIA may also affect access (Ex. Title 22.1 of the Code of Virginia, federal FERPA, etc.)

Public Meetings

Procedures for open, closed, and electronic meetings §§
[2.2-3707](#) through [2.2-3712](#)

Introduction to Meetings under FOIA

- Policy: All meetings must be open unless closed following an exemption – § [2.2-3700](#)
- Definitions of “public body” and “meeting” – § [2.2-3701](#)
- Open Meetings – §§ [2.2-3707](#) through [2.2-3710](#)
- Closed Meetings – §§ [2.2-3711](#) and [2.2-3712](#)
- Electronic Meetings – §§ [2.2-3708.2](#)

Definition of "Public Body"

§ [2.2-3701](#)

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- Any legislative body, authority, board, bureau, commission, district or agency of the Commonwealth or of any political subdivision of the Commonwealth, including cities, towns and counties, municipal councils, governing bodies of counties, school boards and planning commissions
 - Any committee, subcommittee, or other entity however designated, of the public body created to perform delegated functions of the public body or to advise the public body

Definition of “public body”

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- Also includes:
 - Other organizations, corporations or agencies in the Commonwealth supported wholly or principally by public funds (may include tax-exempt organizations, for example)
 - Constitutional officers are included, but only for records purposes

Definition of "meeting"

§ [2.2-3701](#)

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- Includes meetings including work sessions, when sitting physically, or through electronic communication means as a body or entity, or as an informal assemblage of (i) as many as three members or (ii) a quorum, if less than three, of the constituent membership, wherever held, with or without minutes being taken, whether or not votes are cast, of any public body
 - "quorum if less than three" means two members , if they are a quorum of the public body (Ex. A subcommittee with only two or three members total would have a quorum of two members)
 - Must be discussing or transacting public business in real time

Definition of “meeting” - Exceptions

The following are not considered meetings subject to FOIA:

- Gatherings of employees (the meetings rules only apply to members of the public body, not staff)
- Gatherings where no part of the purpose is the discussion or transaction of any public business
- Public forums, candidate appearances, or debates, the purpose of which is to inform the electorate and not to discuss or transact public business

Open Meetings - Requirements

- Notice
- Open to the Public
- Minutes

Notice Requirements

§ [2.2-3707](#)

- Contents: date, time, and location of the meeting
- For local public bodies, FOIA requires notice to be posted in three locations:
 1. Official public government website, if any;
 2. Prominent public location in which notices are regularly posted;
 3. At the office of the clerk of the public body OR at the office of the chief administrator; and

Notice Requirements (continued)

- Regular meetings – post three working days before the meeting
 - Note: Do not count the day of the meeting as one of the working days
- Special, emergency, or continued meetings – two elements:
 - Notice must be “reasonable under the circumstance” (varies with circumstances)
 - Public notice must be posted at the same time the members are notified
- Direct notice to those who request it (usually by an email list)

What does it mean for a meeting to be open to the public?

- Open meeting or public meeting means a meeting at which the public may be present - § [2.2-3701](#)
- Must allow public to record, photograph, film, or otherwise reproduce
- FOIA does not address logistics such as room capacity
- Public bodies are encouraged to use additional means to increase public awareness (Ex. Live streaming online, broadcasting using television or radio, posting recordings of meetings, etc.)

Meeting Minutes

- Only required to be taken at open meetings
- Must include:
 - Date, time, location of the meeting
 - Members of the public body present and absent
 - A summary of matters discussed, deliberated, or decided
 - A record of any votes taken
 - Any motions to enter into a closed meeting and certification after a closed meeting

Agendas

- At least one copy of the proposed agenda and all agenda packets and, unless exempt, all materials furnished to members of a public body for a meeting shall be made available for public inspection at the same time such documents are furnished to the members of the public body.
- FOIA does not have requirements regarding specific agenda items, agenda contents or agenda changes
- FOIA does not address parliamentary procedure

Closed Meeting Procedures

Motion, Discussion, Certification

§§ [2.2-3711](#) and [2.2-3712](#)

Motion to Enter into a Closed Meeting

§ [2.2-3712](#) (A)

- Public body must take an affirmative recorded vote in an open meeting approving a motion that:
 1. Identifies the subject matter for the closed meeting;
 - Must be more than quoting or paraphrasing the exemption
 2. States the purpose of the closed meeting; and
 - Quoting or paraphrasing the exemption does state the purpose
 3. Makes specific reference to the applicable exemption from the open meeting requirements

Closed Meeting Discussions

§ [2.2-3712](#)

- Restricted to those matters specifically exempted from the provisions of FOIA and identified in the motion (do not stray off topic)
- Minutes are not required, and if taken, are exempt from FOIA
- Who may attend?
 - Nonmembers if they are necessary or will aid consideration of the topic
 - Other members of public bodies may attend, but not participate in, closed meetings of committees, subcommittees, and other sub-entities of the parent body

Certification of a Closed Meeting

§ [2.2-3712](#) (D)

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- At the conclusion of a closed meeting, public body must certify that the only things heard, discussed, or considered in the closed meeting were:
 1. Public business matters lawfully exempted from the open meeting requirements, and
 2. Such public business matters as were identified in the motion by which the closed meeting was convened
 - Extra penalty for improper certification

Voting – §§ [2.2-3710](#) & [2.2-3711](#) (B)

- All votes taken to authorize the transaction of any public business must be taken and recorded in an open meeting
- No written or secret ballots
- May take straw polls or reach consensus in closed meetings
- Decisions made in closed meetings are not effective until a vote is taken at an open meeting (§ [2.2-3711](#) (B))

Commonly Used Exemptions

(Note: All meeting exemptions in FOIA are set out in § [2.2-3711.](#))

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- Discussion of personnel - § 2.2-3711 (A) (1)
 - Student admission, discipline, and other matters involving scholastic records - § 2.2-3711 (A) (2)
 - Actual or probable litigation - § 2.2-3711 (A) (7)
 - Specific legal matters - § 2.2-3711 (A) (8)
 - Medical and mental health records - § 2.2-3711 (A) (15)

Electronic Meetings

§ [2.2-3708.2](#)

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- As of 2020, six distinct processes (five in FOIA, one in the state budget) - four of these may be used by any public body, one is limited to regional public bodies, and one is limited to state level public bodies
 - A member of any public body may participate electronically due to
 - Personal matter that prevents attendance
 - Medical condition or disability that prevents attendance
 - Both of these require a quorum, a participation policy, that the remote member's voice can be heard at the main location
 - Personal matters may only be used twice per calendar year per member

Electronic Meetings

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- Two different electronic meetings procedures when the Governor has declared a state of emergency:
 - Purpose limited to responding to the emergency - § [2.2-3708.2](#) (A) (3) (version in FOIA)
 - Broader purposes allowed, but has additional requirements – Budget Item [4-0.01](#) (g) (version in the state budget)
 - Both may be used by any public body
 - No requirement for a quorum or to have a policy in place

Electronic Meetings

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- Members may monitor (listen/watch) even if they cannot participate
- Public & staff participation is always allowed – restrictions only apply to members
- Please see our [Electronic Meetings Guide](#) for a more detailed discussion

A note about FOIA & Social Media

- Because the definition of “public records” includes all types of records that are in the transaction of public business, various forms of social media may be public records
- Because any assemblage of three or more members (or a quorum of two) of a public body discussing or transacting public business simultaneously is a meeting subject to FOIA, social media may also be used to conduct meetings
- Please see our guide on [FOIA & Social Media](#) for a more detailed discussion

Remedies and Penalties

What happens if something goes wrong?

Enforcement is through the courts

§ [2.2-3713](#)

- Petition for mandamus or injunction with affidavit showing good cause
- Mandamus: when the court orders a public official or employee to do something
- Injunction: When the court orders a public official or employee not to do something
- Petitioner may choose to file in general district court or circuit court
- Venue against a local public body is in the jurisdiction where the public body was elected or appointed
- A single violation is sufficient to invoke the remedies

Petition for mandamus or injunction

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- Expedited hearing within seven days
 - Petitioner must notify public body before filing
 - If the petitioner wins, shall be awarded court costs, attorney fees, and any expert witness fees (paid by the public body)
 - Public body bears burden to prove an exemption applies

Willful & Knowing Violations

§ [2.2-3714](#) (A)

- Willful & knowing violation of records and meetings requirements
 - \$500 to \$2000 civil penalty for first violation
 - \$2000 to \$5000 civil penalties for second and subsequent violations
 - Paid by the individual to the Literary Fund (not paid by the public body)
- May introduce advisory opinions of the FOIA Council as evidence that it was not willful & knowing - § [2.2-3715](#)

Improper alteration or destruction of public records - § [2.2-3714](#) (B)

- Records altered or destroyed before record retention period expires
 - With intent to avoid FOIA
 - Civil penalty up to \$100 per record
 - In addition to any other penalties
 - Paid by the individual to the Literary Fund (not paid by the public body)
- Note: Record retention periods are set by the [Library of Virginia](#) under the Virginia Public Records Act

Improper certification of closed meetings

- § [2.2-3714](#) (C)

- Improper certification of closed meeting
 - Civil penalty up to \$1000
 - Paid by public body to the Literary Fund
 - Mitigating factors: Opinions of the Attorney General, court cases, published Advisory Opinions from the FOIA Council